SAIC Launches First Abuse of Dominance Investigation under AML

July 19, 2013
Attorney Articles

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Zhang Mao, chief of China’s State Administration for Industry and Commerce (SAIC), disclosed in a lecture on July 5 that the SAIC has launched an investigation against Tetra Pak for alleged abuse of market dominance through tying and discrimination. This is the SAIC’s first publicly announced investigation into abuse of dominance since the PRC Anti-Monopoly Law (AML) came into force in 2008. The investigation also represents an extraordinary joinder of more than twenty provincial and municipal branches of the SAIC countrywide that have been mobilized jointly to conduct the investigation.

Focus on Tying and Discrimination. The investigation focuses on Tetra Pak’s abuse of its advantage in liquid food packaging equipment and technological services, such as tying of packaging materials to packaging equipment, and discriminatory treatment that favors top-tier dairy companies. Although Tetra Pak reportedly removed tie-in provisions from its agreements after the AML came into effect, media reports allege that Tetra Pak still engages in sales bundling, albeit in a disguised form.

Customer and Competitor Complaints. The investigation may have been prompted by complaints from Tetra Pak’s customers and competitors. Complaints about Tetra Pak’s alleged abuse of market dominance go back as far as 2003, involving a Chinese competitor Tralin then based in Shandong. Tralin’s numerous complaints and lobbying activities are believed to have been one of the catalysts for the promulgation of the AML. Tralin, now known as Greatview Aseptic Packaging Company, has become the biggest competitor to Tetra Pak in the Chinese market and the world’s second largest supplier of roll-fed aseptic packaging material.

Timing and Process. Under the SAIC’s procedural rules, the investigation will be followed by a hearing during which Tetra Pak should have the opportunity to defend itself against the allegations made against it. Tetra Pak will also have the opportunity to apply for suspension of the investigation and undertake to eliminate the impact of its conduct within a time period agreed to by the SAIC.

Previous Abuse of Dominance Matters. Before the Tetra Pak investigation, the most recent case involving abuse of market dominance had been internet company Qihoo’s lawsuit against its competitor, Tencent. The market position of Qihoo’s anti-trojan software was threatened by Tencent when Tencent bundled its own anti-trojan software with QQ, its most popular instant messaging service. In 2010 Qihoo released software to protect users’ privacy by uncovering the alleged monitoring activities of QQ. Tencent responded two months later by requiring its users to choose between either Tencent or Qihoo. The confrontation has led to several lawsuits between the two companies, including the antitrust litigation. A first instance judgment was rendered against Qihoo on March 20, 2013; and Qihoo has appealed against the judgment to the Supreme People’s Court.

Increasing Confidence. The SAIC will gain confidence as a result of its experience with Tetra Pak, and more investigations can be expected in the near future. Multinational companies with substantial market shares in China should...
recognize their vulnerability to market dominance claims and investigations, especially in market segments with competitors that may be inclined to lodge complaints with the SAIC.

Dorsey & Whitney LLP and Chinese law firm Martin Hu and Partners share a Special Counsel Relationship, and are contiguously located on the 8th Floor of Kerry Parkside, Shanghai.